
SUPREME COURT OF THE UNITED STATES

No. 872

October Term, 1941

STATE OF GEORGIA, Petitioner

vs.

HIRAM W. EVANS

JOHN W. GREER, JR.

THE AMERICAN BITUMULS COMPANY
SHELL OIL COMPANY, INCORPORATED
EMULSIFIED ASPHALT REFINING COMPANY,

Respondents.

Brief of the States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, as Amici Curiae.

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**AMICI CURIAE BRIEF IN SUPPORT OF THE
PETITION FOR CERTIORARI.**

INTRODUCTION

The States of Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, sovereign States

of the United States of America, join in filing this brief as amici curiae in support of the petition for certiorari, for the following reasons:

1. The named States have an interest in the rule of law to be enunciated by this Honorable Court in this case if the petition for the writ of certiorari is granted, and,

2. The named States believe the rule of law declared by the United States Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the United States District Court for the Northern District of Georgia in this case to be erroneous because it improperly deprives a State of the right to maintain action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act. (See Appendix.)

I. INTEREST OF THE AMICI CURIAE.

The States which have joined in filing this brief as amici curiae have no interest in the outcome of this cause insofar as the facts or merits of the particular case are concerned. Their sole interest is in the rule of law adopted by the Circuit Court of Appeals, and the apprehension of these Amici Curiae arises solely from their belief that if certiorari is not granted, and the judgment of the Circuit Court of Appeals is not reversed, an erroneous principle of law enunciated by the court below will be allowed to stand; one which will greatly limit and restrict the remedies available to a State which has been injured or damaged in its property by a violation of the United States anti-trust laws.

II. STATEMENT OF THE CASE.

The State of Georgia filed a civil action on March 25, 1941, alleging, in substance, that the respondents had violated Sections 1 and 2 of the Act of July 2, 1890, Ch. 647,

26 Stat. 209, 15 U. S. C. 1 and 2, and that by reason of such violation the State was injured and damaged in its property in the actual amount of \$128,027.13. The prayer was for treble damages. (R. 1-26)

The respondents filed separate motions to dismiss the complaint, asserting that the State was not a "person" upon whom a right of action for treble damages was conferred by Section 7 of the Act of July 2, 1890, or by Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 730, 731. (R. 27-34)

These motions were sustained and the District Court entered separate judgments dismissing the complaint as to each of the Respondents. (R. 34). An appeal having been prosecuted, the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 42).

The decision of the Circuit Court of Appeals is reported at State of Georgia vs. Evans et al., 123 Fed. (2) 57.

III. THE ISSUES INVOLVED.

The question presented is whether a State may maintain an action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act.

The argument of the Amici Curiae in this brief will be limited to the contention that the writ of certiorari should be granted because the case involves an important question of Federal law which has not been but should be decided by this Court. However, the assignments of error in the petition for certiorari (P. 5) are here adopted as a part of this brief since the Amici Curiae, or some of them, may desire to discuss the issues thereby raised more fully if the writ is granted.

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IV. REASONS WHY THE WRIT SHOULD BE GRANTED.

The case involves an important question of Federal law which has not been but should be decided by this Court.

• (A) The question has not been decided by this Court.

• The District Court, in sustaining the motions of Respondents and dismissing the complaint, and the Circuit Court of Appeals, in affirming the judgment of the District Court, relied solely on the decision of this Court in *United States vs. Cooper Corporation*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667. (R. 34, 41). The question presented in that case was whether the United States could maintain an action for treble damages under Section 7 of the Sherman Act. The question now presented was not before the Court in the Cooper case.

The decision in the Cooper case is no authority for the conclusion reached by the District Court and the Circuit Court of Appeals in this case. The aids to construction there relied on are not persuasive where a state brings the action. This is especially true with reference to the conclusions that the ordinary dignities of speech would have led Congress to mention the name of the United States; that the scheme and structure of the legislation afforded the United States criminal and civil remedies for the enforcement of the Acts; that other legislation having a similar scheme or purpose could be looked to by the Court in construing Section 7 of the Sherman Act; that the legislative history of the Sherman Act showed that a provision for civil-suits by the United States was eliminated when the original-draft of the bill was rewritten, and provisions were substituted specifying the remedies available to the United States; and that the administrative construction of the

United States officers had been that Section 7 did not include the United States.

Any general language used in the decision in the Cooper case, or in the authorities there cited, which might be deemed applicable to the question now presented may be persuasive but is not controlling. The argument used in stating the opinion of the Court in that case must be referred to the subject before it and construed in connection with the question to be decided there. *Moorewood v. Enquist*, 23 How. 491, 495, 16 L. Ed. 516, 517.

Where the specific question does not appear to have been raised the Court does not consider itself bound by the view expressed in the earlier case. *Cross vs. Burke*, 146 U. S. 82, 86, 36 L. Ed. 896, 898.

Thus the question presented in the instant case is not controlled by the decision in the Cooper case. It has never been decided by this Court.

(B) The Case presents an important question of Federal law.

The question presented is an important question of Federal law. Its solution depends upon the proper construction of Section 7 of the Sherman Act and Section 4 of the Clayton Act. It is important because it is a question of concern to all of the Amici Curiae, and if it is decided as the Amici Curiae believe it should be decided, will help to effectuate the public policy evidenced by the United States anti-trust laws. The States are large purchasers of commodities moving in interstate commerce. The restraint of trade in interstate commerce by the control of prices and the elimination and suppression of competition in respect to such commodities results in injury and damage to the property of the States, by forcing the payment of higher

prices than those at which such commodities could have been obtained in an open, competitive market.

The rule of law adopted by the District and Circuit Courts, which prohibits the States from maintaining an action for treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act leaves the States without a remedy provided by those Acts, and therefore is believed to be inconsistent with the broad conception of public policy upon which the United States anti-trust laws were founded, to make the remedies co-extensive with the injury sought to be prohibited.

The Amici Curiae respectfully request that the writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit be granted.

THOS. S. LAWSON,
Atty. Gen. of Alabama,
Montgomery, Alabama.

JOSEPH CONWAY,
Atty. Gen. of Arizona,
Phoenix, Arizona.

JACK HOLT,
Atty. Gen. of Arkansas,
Little Rock, Arkansas.

FRANCIS A. PALLOTTI,
Atty. Gen. of Connecticut,
Hartford, Connecticut.

JAMES R. MORFORD,
Atty. Gen. of Delaware,
Wilmington, Delaware.

J. TOM WATSON,
Atty. Gen. of Florida,
Tallahassee, Florida.

BERT H. MILLER
Atty. Gen. of Idaho,
Boise, Idaho.

GEORGE N. BEAMER,
Atty. Gen. of Indiana,
Indianapolis, Indiana.

JOHN M. RANKIN,
Atty. Gen. of Iowa,
Des Moines, Iowa.

JAY S. PARKER,
Atty. Gen. of Kansas,
Topeka, Kansas.

HUBERT MEREDITH,
Atty. Gen. of Kentucky,
Frankfort, Kentucky.

EUGENE STANLEY,
Atty. Gen. of Louisiana,
Baton Rouge, Louisiana.

FRANK I. COWAN,
Atty. Gen. of Maine,
Augusta, Maine.

WILLIAM C. WALSH,
Atty. Gen. of Maryland,
Baltimore, Maryland.

ROBERT T. BUSHNELL,
Atty. Gen. of Massachusetts,
Boston, Massachusetts.

HERBERT J. RUSHTON,
Atty. Gen. of Michigan,
Lansing, Michigan.

GREEK L. RICE,
Atty. Gen. of Mississippi,
Jackson, Mississippi.

ROY MCKITTRICK,
Atty. Gen. of Missouri,
Jefferson City, Missouri.

JOHN W. BONNER,
Atty. Gen. of Montana,
Helena, Montana.

WALTER R. JOHNSON,
Atty. Gen. of Nebraska,
Lincoln, Nebraska.

GRAY MASHBURN,
Atty. Gen. of Nevada,
Carson City, Nevada.

FRANK R. KENISON,
Atty. Gen. of New Hampshire,
Concord, New Hampshire.

EDWARD P. CHASE,
Atty. Gen. of New Mexico,
Santa Fe, New Mexico.

JOHN J. BENNETT, JR.,
Atty. Gen. of New York,
Albany, New York.

ALVIN C. STRUTZ,
Atty. Gen. of North Dakota,
Bismarck, North Dakota.

I. H. VAN WINKLE,
Atty. Gen. of Oregon,
Salem, Oregon.

CLAUDE T. RENO,
Atty. Gen. of Pennsylvania,
Harrisburg, Pennsylvania.

GROVER A. GILES,
Atty. Gen. of Utah,
Salt Lake City, Utah.

ALBAN J. PARKER,
Atty. Gen. of Vermont,
Montpelier, Vermont,

ABRAM P. STAPLES,
Atty. Gen. of Virginia,
Richmond, Virginia.

SMITH TROY,
Atty. Gen. of Washington,
Olympia, Washington.

CLARENCE W. MEADOWS,
Atty. Gen. of West Virginia,
Charleston, West Virginia.

JOHN E. MARTIN,
Atty. Gen. of Wisconsin,
Madison, Wisconsin.

EWING T. KERR,
Atty. Gen. of Wyoming,
Cheyenne, Wyoming.

APPENDIX

1890, July 2, Ch. 647, Sec. 7,
26 Stat. 209, 210.

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

1890, July 2, Ch. 647, Sec. 8,
26 Stat. 209, 210.

"That the word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

1914, October 15, Ch. 323, Sec. 4,
38 Stat. 730, 731.

"That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."